

Revised Interpretation of Clean Water Act Tribal Provision

Summary

Section 518 of the Clean Water Act (CWA) authorizes EPA to treat eligible Indian tribes with reservations in a manner similar to states (TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA authorities.

EPA's interpretive rule streamlines how tribes apply for TAS under CWA section 518 for CWA regulatory programs including the water quality standards program. This reinterpretation facilitates tribal involvement in the protection of reservation water quality as intended by Congress.

Background

Since 1991, EPA has followed a cautious approach that requires applicant tribes to demonstrate inherent authority to regulate waters and activities on their reservations under principles of federal Indian common law.

The agency has consistently stated that its approach was subject to change in the event of further congressional or judicial guidance addressing tribal authority under section 518 of the CWA.

Based on such guidance, and after considering public comments, EPA concludes definitively that section 518 includes an express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations, subject to the eligibility requirements in section 518.

This interpretive rule will reduce burdens on applicants associated with the existing TAS application process and has no significant cost.

What does the reinterpretation do?

This reinterpretation eliminates the need for applicant tribes to demonstrate inherent authority to regulate under the CWA, thus allowing tribes to implement the congressional delegation of authority.

The reinterpretation also brings EPA's treatment of tribes under the CWA in line with EPA's treatment of tribes under the Clean Air Act, which has similar statutory language addressing tribal regulation of Indian reservation areas.

What would not change under the reinterpretation?

This reinterpretation does not revise any EPA regulations.

Regulatory provisions remain in effect requiring tribes to identify the boundaries of the reservation areas over which they seek to exercise authority, as do provisions allowing the adjacent state(s) to comment to EPA on an applicant tribe's assertion of authority.

Does the reinterpretation affect the geographic scope of TAS?

No. The reinterpretation neither expands nor contracts the geographic scope of potential tribal TAS eligibility. Under the CWA, tribes can only obtain TAS status over waters within the borders of their

reservations. (Tribal trust lands are reservation lands even if they are not within a formal reservation.)

Does the reinterpretation affect any existing limitations on tribal criminal enforcement authority?

No. The reinterpretation relates solely to civil regulatory authority.

What if my tribe or state has special circumstances affecting CWA regulatory authority?

There could be instances where special circumstances limit or preclude a particular tribe's ability to accept or effectuate the congressional delegation of authority over its reservation. For example, there could be a separate federal statute establishing unique jurisdictional arrangements for a specific state or reservation. EPA takes no position in this reinterpretation regarding whether any particular tribe or Indian reservation is subject to any such circumstances. Any such issue would be addressed on a case-by-case basis and with the benefit of a full record of relevant information that would be developed during the processing of a particular tribe's application for eligibility to regulate under the CWA.

Who is potentially affected by the reinterpretation?

Federally recognized Indian tribes with reservations that could potentially seek eligibility to administer CWA regulatory programs, and other interested tribes.

States adjacent to potential applicant tribes.

Industries or municipalities discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.

Does the reinterpretation affect previous EPA approvals of TAS for water quality standards?

No. It does not affect previous EPA approvals of tribal TAS for water quality standards.

Does the reinterpretation affect the scope of existing state regulatory programs approved by EPA under the CWA?

No. The reinterpretation does not affect the scope of existing EPA-approved state regulatory programs under the CWA.

Is EPA providing additional funding for tribes with TAS for regulatory programs?

EPA will continue to consider tribal resource issues in its budgeting and planning process. However, EPA cannot assure tribes that additional funding will be available for a tribe to develop or implement a CWA regulatory program.

Where can I find more information?

Contact Thomas Gardner by email at Gardner.Thomas@epa.gov or by phone at (202) 566-0386, or visit EPA's website at: <http://www.epa.gov/wqs-tech/revised-interpretation-clean-water-act-tribal-provision>.